Supreme Court, U. S.
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in the

Supreme Court

of the

United States

October Term, 1978

NO. 78-538

FRANK CRIPPEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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in the

Supreme Court

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NO.

FRANK CRIPPEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays a writ of certiorari issue to review the judgment below of the United Court of Appeals for the Fifth Circuit. This judgment affirms the petitioner's conviction under Title 18 §1623 on two counts of perjury.

I. OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 570 F.2d 535. The opinion denying petition for rehearing and rehearing *en banc* is not yet reported. The District Court opinion denying Petitioner's motion to dismiss the indictment is unreported. All three opinions are set forth in the appendix.

II. JURISDICTION.

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (1). The Court of Appeals entered its judgment and its opinion on March 30, 1978. The Court of Appeals entered its order and opinion denying Petitioner's timely filed Petition for Rehearing *en banc* on August 31, 1978.

III. QUESTIONS PRESENTED.

A. Whether, where two courts of appeal are in conflict, this Court should resolve the important issue of the necessary minimum materiality contents of an indictment for perjury under the much used Title 18 U.S.C. §1623, to wit, whether an indictment sufficiently alleges the essential element of materiality where it fails to disclose in what respect the testimony was material to the grand jury's inquiry.

B. Whether a perjury indictment under Title 18 U.S.C. §1623 which does not show on its face that the question pertains to a matter under investigation by the grand jury should be dismissed for failure to sufficiently allege materiality and thus whether the decision below conflicts with *Sinclair vs. United States*, 279 U.S. 263 (1929) and *Russell v. United States*, 369 U.S. 749 (1962).

C. Whether under Federal Rule of Evidence 608(b), which permits cross-examination of a character witness by asking about specific prior misconduct of the Defendant for the sole purpose of attacking the character witness's credibility, when a defendant in his grand jury testimony admits misconduct precisely identical to the misconduct for which he is being tried, and the conduct was not then a crime, the prosecutor may ask a character witness whether he has heard about that conduct when it is unknown in the community, or whether such cross-examination is prohibited under *Shimon v. U.S.*, D.C. Cir. 1965, 352 F.2d 449, and *United States v. Curry*, 4 Cir. 1975, 512 F.2d 1299 because its thrust is to affirmatively prove Defendant's prior misconduct and to infer the Defendant is guilty of the offense charged.

IV. STATUTES AND RULES INVOLVED.

A. 15 U.S.C. §1233 reads in pertinent part as follows:

> ". . . (c) Any person who wilfully removes, alters, or renders illegible any label affixed to a new automobile pursuant to Section 1232 of this Title, or any endorsement thereon, prior to the time that such automobile is delivered to the actual custody and possession of the ultimate purchaser of such new automobile . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both."

B. 15 U.S.C. §1984:

> "No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon."

C. 15 U.S.C. §1990(c) reads in pertinent part as follows:

> "(a) Any person who knowingly and wilfully commits any act or causes to be done any act that violates any provisions of this sub-chapter or knowingly and wilfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more than $50,000 or imprisoned not more than one-year, or both." Enacted July 14, 1976.

D. 18 U.S.C. §1623 reads in pertinent part as follows:

> "(a) whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

E. Federal Rule of Evidence 608 — Evidence of Character and Conduct of Witness:

> ". . . (b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

F. Federal Rule of Evidence 403 — Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

V. STATEMENT OF THE CASE.

The facts necessary to the determination of the three questions presented are adequately set forth in the opinions of the Court. (App. 10-32).

VI. REASONS FOR GRANTING THE WRIT.

A. *Conflict With Slawik and Importance of Question.*

A perjury indictment alleging only a conclusion of materiality in the language of the statute and which fails to disclose in what respect the testimony was material to the grand jury's inquiry is insufficient under the holdings of the Third Circuit in *United States v. Slawik,* 3 Cir. 1977, 548 F.2d 75, 79, and *United States v. Crocker,* 3 Cir. 1977, 568 F.2d 1049, 1056, 1057. It is insufficient because the reviewing court cannot properly perform its function in determining materiality. *Crocker* at 1056, 1057, *Slawik,* at 83, 84.

In the case at bar, the indictment baldly states that it was material to the grand jury's price sticker investigation to determine whether odometers had been turned back. (App. 1, 2) There is, however, absolutely no indication how a statement denying knowledge of odometer alteration would, if false, be capable of impeding or influencing an investigation of the grand jury into the removal of price stickers under 15 U.S.C. §1233. On its face, there is no connection between the two subject matters.

The District Court, however, filled in the materiality gap by inference and incorrectly found the materiality allegations of the indictment to be sufficient on the basis the odometer questions were material to "an *alleged* scheme" tying together odometer alterations and price sticker removals. (App. 12, 13). Here lies the heart of the problem: no scheme is alleged in the indictment. No court can go beyond the four corners of the indictment in determining a motion to dismiss and, as

the prosecutor himself admitted, nothing on the face of the indictment shows odometer alterations to be material to price sticker removal. (App. 33). An indictment must stand or fall on its own. It cannot be cured by a bill or particulars.

Thus, in the Third Circuit, this indictment would fail. The opinion on rehearing below of the Fifth Circuit, however, admitted this but specifically refused to follow *Slawik*. There is even an internal conflict within the Fifth Circuit; for, in two other recent opinions the Fifth Circuit followed *Slawik*. *See, United States v. Abrams*, 5 Cir. 1978, 568 F.2d 411, 420, 421, and *United States v. Brumley*, 5 Cir. 1977, 560 F.2d 1268, 1275.

Many cases can be cited for the proposition that where materiality of a statement is clear from the face of the indictment, a conclusory allegation is sufficient; but where materiality is not clear on the face of the indictment or, as here, where apparent immateriality is suggested on the face of the indictment, the materiality allegations of the indictment must be sufficient to enable the reviewing court to determine the essential element of materiality from the indictment alone. *Slawik, Crocker, supra.*

A perjury indictment is also insufficient unless it pleads that the question asked pertains (i.e. is material to) to a matter under investigation by the grand jury. *Sinclair v. United States*, 279 U.S. 263 at 296, 297. Even the prosecutor below admitted that on its face this indictment does not meet that test (App. 33). The indictment states the grand jury was investigating violations of 15 U.S.C. §1233 which makes it a crime to remove a manufacturer's price sticker from a new automobile.

(App. 1). It is uncontested that at the time the grand jury was meeting it was not a crime to turn back odometers, and that therefore, the grand jury had no authority to investigate odometer alterations standing alone.

For failure of the indictment on its face to plead that an inquiry concerning odometer alterations pertained to some matter the grand jury was investigating the indictment is clearly deficient. The decision below, therefore conflicts with *Sinclair, supra,* and *Russell v. United States*, 369 U.S. 749 (1962).

This court should resolve this important question of Federal Criminal procedure. The import of this question is great. Title 18 U.S.C. §1623 is a much used statute. The question of the minimum necessary materiality contents of a perjury indictment has plagued the courts often in the past. Now with the clear conflict between *Slawik* and *Crippen*, the question will be a continuing source of dispute until resolved. *Every* perjury indictment which does not meet the *Slawik* test will be challenged by every defendant. Every District Court will be faced with this issue on every single perjury indictment.

The issue is far greater than a mere procedural formality. Materiality is an essential element of the crime. It goes to the very heart of due process to require an indictment to set forth each essential element of the charge. A Defendant must know to what subject matter the inquiry is material otherwise he cannot prepare his defense on the factual issue of materiality. As the Court said in *Crocker, supra:*

"The government cannot, as a matter of due process, conceal from judicial review, by an indictment in the language of a statute or by a general verdict, the question of whether the defendant's conduct actually was a crime." 568 F.2d at 1056, 1057.

There are hundreds, perhaps thousands of perjury indictments each year. When a pure conflict exists, as it does here, and the conflict is on an important procedural and due process question, this Court should issue a writ.

B. *Conflict with Shimon and Curry.*

The character witnesses were each asked on cross-examination whether they were aware the defendant had hired a man to alter odometers in 1972 and prior years. The prosecutor learned this when the defendant told him this in the grand jury. This conduct of the defendant was not a crime until 1976 and was not known in the community. In no way then would a character witness have heard of this conduct, and thus his credibility in reflecting accurately the community opinion of defendant's reputation was unassailable by this information.

Federal Rule of Evidence 608(b) permits cross-examination of prior instances of a defendant's misconduct only for the "purpose of attacking the character witnesses's credibility". The rule does not change the holdings of *Shimon v. United States*, D.C. Cir. 1965, 352 F.2d 449 or *United States v. Curry*, 4 Cir. 1975, 512 F.2d 1299, 1305, that there is a fine line to be drawn.

As Judge, now Chief Justice, Burger said in reversing a conviction for precisely the same reasons urged here:

"The target of the impeachment of a reputation witness is the credibility of the witness, not the prior misconduct of the defendant." *Shimon* at 454.

The thrust of the impeachment below was clearly not to discredit the character witnesses credibility [for the defendant's prior misconduct was unknown in the community and could not have been heard by the character witness], but was rather to bring before the jury the fact that the defendant had hired a man to alter odometers in 1972, and indirectly lead the jury to infer that the defendant was guilty of the crime charged, to wit, lying about his awareness of odometers being altered in 1974 by the same man he had hired in 1972. The evidence was devastating. It was the lynchpin of the case.

An extraordinarily important limitation on character witness cross-examination is wiped out by the opinion below. Rule 608(b) was not intended to overrule *Shimon* or *Curry*. The opinion below overrules these cases and, despite briefing in detail, fails to discuss these cases. The opinion does not even discuss the impact of impeachment questions involving the same kind of conduct for which the defendant is being tried. The Supreme Court has not spoken on character witness cross-examination limits since 1948. See, *Michelson v. United States*, 335 U.S. 469 (1948). The interpretation of Rule 608(b) below negating *Shimon* and *Curry* requires this Court to discuss the relationship between

Michelson, *Shimon* and the new rule when faced with similar conduct cross-examination. This is especially true when *Shimon* carefully distinguished the cross-examination permitted in *Michelson* stating "the impeachment question there revolved around 'an offense not closely similar to the one on trial'" *Shimon* at 454. Character witness cross-examination arises in the majority of criminal trials. It is an area subject to enormous potential abuse. The line identified by Judge Burger's opinion in *Shimon* must be preserved. The Court below relies on *Michelson* for permitting the cross-examination. *Shimon*, however, relied on *Michelson* for its conclusion the same type of cross-examination is prohibited. Almost no case has been dissected by commentators as much as *Michelson*. In light of the new rules, the rejection of *Shimon's* limits, and the 30-year period since speaking on character witness cross-examination limits, the Court should review the opinion below to clarify this important area.

VII. CONCLUSION.

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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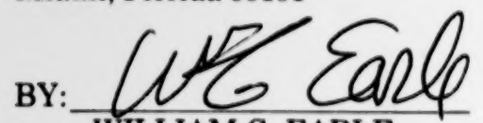
BY: 
WILLIAM G. EARLE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to JAMIE L. WHITTEN, Assistant United States Attorney, 300 Ainsley Building, Miami, Florida 33131, this 27th day of September, 1978.

WILLIAM G. EARLE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 78-127 Cr-CA

UNITED STATES OF AMERICA,

v.

FRANK CRIPPEN

INDICTMENT

The Grand Jury charges that:

COUNT I

1. On or about March 7, 1975, at Miami, in the Southern District of Florida, the defendant,

FRANK CRIPPEN

while testifying under oath in a proceeding before the Grand Jury of the United States of America, knowingly made a false, material declaration in a matter that was under investigation by the said Grand Jury.

2. At the time and place aforesaid the Grand Jury was conducting an investigation to determine whether violations of the Disclosure of Automobile Information Laws and other statutes of the United States had been committed in the Southern District of Florida.

3. It was material to the aforesaid investigation to determine who, if anyone, was removing and altering automobile manufacturer's labels on automobiles at Crippen Oldsmobile, Inc. of Dade County, Florida.

4. It was also material to the aforesaid investigation to determine who, if anyone, was altering the odometer readings on automobiles at Crippen Oldsmobile, Inc. of Dade County, Florida, so that the odometers would not accurately reflect the actual mileage of the automobiles.

5. At the time and place alleged in paragraph one herein, Frank Crippen appeared as a witness before the Grand Jury and under oath testified with respect to the material matter, as follows:

Q. Are you aware of any cars being sold by Crippen Oldsmobile in 1974 that had odometers turned back?

A. No, I am not.

6. The aforesaid testimony of Frank Crippen, as he then and there knew, was false in that Frank Crippen was aware of cars being sold by Crippen Oldsmobile in 1974 with odometers which had been turned back; all in violation of Title 18, United States Code, Section 1623.

COUNT II

1. On or about March 7, 1975, at Miami, in the Southern District of Florida, the defendant,

FRANK CRIPPEN

while testifying under oath in a proceeding before the Grand Jury of the United States of America, knowingly made a false, material declaration in a matter that was under investigation by the said Grand Jury.

2. At the time and place aforesaid the Grand Jury was conducting an investigation to determine whether violations of the Disclosure of Automobile Information Laws and other statutes of the United States had been committed in the Southern District of Florida.

3. It was material to the aforesaid investigation to determine who, if anyone, was removing and altering automobile manufacturer's labels on automobiles at Crippen Oldsmobile, Inc. of Dade County, Florida.

4. It was also material to the aforesaid investigation to determine who, if anyone, was altering the odometer readings on automobiles at Crippen Oldsmobile, Inc. of Dade County, Florida, so that the odometers would not accurately reflect the actual mileage of the automobiles.

5. At the time and place alleged in paragraph one herein, Frank Crippen appeared as a witness before the Grand Jury and under oath testified with respect to the material matter, as follows:

Q. Mr. Crippen, at any time in the year 1974 did you ever order or request anyone to turn back an odometer at Crippen Oldsmobile?

A. No, I did not.

6. The aforesaid testimony of Frank Crippen, as he then and there knew, was false in that Frank Crippen knew he had ordered and requested Paul L. LaChance to turn back odometers at Crippen Oldsmobile in 1974; all in violation of Title 18, United States Code, Section 1623.

COUNT III

1. On or about March 7, 1975, at Miami, in the Southern District of Florida, the defendant,

FRANK CRIPPEN

while testifying under oath in a proceeding before the Grand Jury of the United States of America, knowingly made a false, material declaration in a matter that was under investigation by the said Grand Jury.

2. At the time and place aforesaid the Grand Jury was conducting an investigation to determine whether violations of the Disclosure of Automobile Information Laws and other statutes of the United States had been committed in the Southern District of Florida.

3. It was material to the aforesaid investigation to determine who, if anyone, was removing and altering automobile manufacturer's labels on automobiles at Crippen Oldsmobile, Inc. of Dade County, Florida.

4. It was also material to the aforesaid investigation to determine who, if anyone, was altering the odometer readings on automobiles at Crippen Oldsmobile, Inc. of Dade County, Florida, so that the odometers would not accurately reflect the actual mileage of the automobiles.

5. At the time and place alleged in paragraph one herein, Frank Crippen appeared as a witness before the Grand Jury and under oath testified with respect to the material matter, as follows:

Q. At any time in 1974 did Paul L. LaChance, while working on the premises of Crippen Oldsmobile here in Miami, turn back an odometer?

A. No, not that I know of.

6. The aforesaid testimony of Frank Crippen, as he then and there knew, was false in that Frank Crippen knew that Paul L. LaChance turned back odometers while working on the premises of Crippen Oldsmobile in 1974; all in violation of Title 18, United States Code, Section 1623.

COUNT IV

On or about March 7, 1975, at Miami, in the Southern District of Florida, the defendant,

FRANK CRIPPEN

well knowing that a Grand Jury of the United States was conducting an investigation and inquiry in said District, and that Paul L. LaChance had been subpoenaed by, and was about to be a witness before, said Grand Jury with respect to matters material to the investigation and inquiry being conducted by said Grand Jury, did knowingly, wilfully, and corruptly endeavor to influence, obstruct and impede the due and proper exercise of the power of inquiry under which the said Grand Jury was conducting the aforesaid investigation and inquiry, by counselling, advising, and suggesting to Paul L. LaChance that he give fictitious, fraudulent, false and manufactured testimony before said Grand Jury concerning a matter material to the investigation and inquiry, that is, pertaining to the turning back of automobile odometers at Crippen Oldsmobile to make it appear that these automobiles had substantially less mileage than was actually the fact; all in violation of Title 18, United States Code, Section 1505.

COUNT V

On or about March 1, 1975, at Miami, in the Southern District of Florida, the defendant,

FRANK CRIPPEN

well knowing that a Grand Jury of the United States was conducting an investigation and inquiry in said District, did knowingly, wilfully and corruptly endeavor to influence, obstruct and impede the due and proper exercise of the power of inquiry under which the said Grand Jury was conducting the aforesaid investigation and inquiry by causing to be manufactured and fabricated false records for delivery to said Grand Jury concerning a matter material to the investigation and inquiry, that is, pertaining to the turning back of automobile odometers at Crippen Oldsmobile to make it appear that these automobiles had substantially less mileage than was actually the fact; all in violation of Title 18, United States Code, Sections 1505 and 2.

COUNT VI

That on or about August 8, 1974, in Dade County, in the Southern District of Florida, the defendant,

FRANK CRIPPEN

did knowingly, wilfully, and unlawfully cause to be removed and altered a label affixed to a new 1974 Toronado, VIN 3Y57W4M710935 pursuant to Title 15, United States Code, Section 1232, by the automobile's manufacturer, before said automobile was delivered to the actual custody and possession of the ultimate purchaser of said automobile; and did cause to be affixed to said automobile a substitute label which substantially increased the manufacturer's suggested retail price; all in violation of Title 15, United States Code, Section 1233.

A TRUE BILL

/s/ [Illegible]
FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By: /s/ Jamie L. Whitten
JAMIE L. WHITTEN
Assistant United States Attorney

[FILED MARCH 18, 1976]

[FILED JUN 30 1976]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 76-127-Cr-JLK

UNITED STATES OF AMERICA

VS.

FRANK CRIPPEN,

Defendant.

ORDER AFFIRMING MAGISTRATE'S RULING

This cause came on for consideration upon defendant's petition for a review of a ruling of the United States Magistrate which denied the defendant's motion to dismiss the complaint in the above-styled cause. The court, having considered the record, heard argument, and being fully advised in the premises, finds and concludes that the magistrate's ruling should be affirmed.

Counts I, II, III of the indictment charge this defendant with violations of 18 U.S.C. Sec. 1623, for making false, material declarations to a grand jury in answering certain questions put to him concerning the turning back or altering of odometers on automobiles. The indictment states that the "Grand Jury was conducting an investigation to determine whether violations of the Disclosure of Automobile Information Laws and other

statutes of the United States had been committed in the Southern District of Florida."

It is clear that the grand jury was chiefly concerned with investigating possible violations of 15 U.S.C. Sec. 1233(c) which provides:

> Any person who willfully removes, alters, or renders illegible any lable affixed to a new automobile pursuant to section 1232 of this title, or any endorsement thereon, prior to the time that such automobile is delivered to the actual custody and possession of the ultimate purchaser of such new automobile, except where the manufacturer relables the automobile in the event the same is rerouted, repurchased, or reacquired by the manufacturer of such automobile, shall be fined not more than $1,000, or imprisoned not more than one year or both. Such removal, alteration, or rendering illegible with respect to each automobile shall constitute a separate offense.

In the common jargon of the automobile industry, these labels are referred to as, "the manufacturer's suggested retail price sticker", (hereinafter, "price stickers").

It is the theory of the defendant that questions posed to him before the grand jury about the turning back of odometers is not material to proof of the crime of removing price stickers. The defendant correctly cites the recent case of *United States v. Whimpy*, 531 F.2d 768 (5th Cir. 1976), for the proposition that one of the five elements required to be proven to establish a case under 18 U.S.C. Sec. 1623 for perjury is that the

testimony must be material to the proof of the crime. The defendant argues that the turning back of odometers is not, and cannot be material to the crime of removing price stickers. Further, he argues, that since turning back odometers is a civil offense and not a crime, 15 U.S.C. Sec. 1984, 1989, the grand jury was acting beyond its authority in investigating and asking questions about odometers, and thus any answer given could not be perjury because it would not be material to proof of a crime. Although defendant's theory has some logical appeal, it is legally unpersuasive.

In *Whimpy, supra,* at p. 770, Chief Judge Brown, writing for the court, said: "The case law has established very broad parameters to what is considered material and essentially anything that could influence or mislead the trial court or the jury is considered to be material." (citing cases). Furthermore, the same panel that decided *Whimpy,* in a per curium decision in *United States v. Saenz,* 511 F.2d 766 (5th Cir. 1975), described the test for materiality as follows:

> The test is whether the false testimony was capable of influencing the tribunal on the issue, or whether it would have the natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation. *Id* at 768.

This court finds that the alleged false testimony concerning turning back odometers was capable of influencing the grand jury on the issue of whether or not price stickers were removed since such testimony went to the intent, motivation and involvement or non-involvement of the defendant in an alleged scheme

which included both removing price stickers and turning back odometers.

As to the remaining contentions of the defendant that Counts I-V of the indictment should be dismissed, the court finds that the Magistrate was correct in denying the motion. It is therefore

ORDERED and ADJUDGED that the ruling of the Magistrate, denying defendant's motion to dismiss, be and the same is hereby affirmed.

DONE and ORDERED in chambers at Miami, Florida, this 29th day of June, 1976.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: U.S. Attorney
Quinton, Leib & Lummus
Rollins, Peeples & Meadows

United States Court of Appeals
For the Fifth Circuit

No. 76-4486

D. C. Docket No. 76-127-Cr-JLK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK CRIPPEN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before COLEMAN, HILL and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 30, 1978

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frank CRIPPEN, Defendant-Appellant.

No. 76-4486.

United States Court of Appeals,
Fifth Circuit.

March 30, 1978.

Defendant was convicted in the United States District Court for the Southern District of Florida, James Lawrence King, J., on two counts of perjury, and he appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) a question put to defendant while he was testifying before a grand jury was sufficiently clear and precise to be the basis for a subsequent charge of false testimony; (2) evidence was adequate to support the verdict; (3) the district court did not err in permitting the prosecutor to attempt to undermine the credibility of defendant's character witnesses by asking the witnesses whether their opinion of defendant would be the same had they known that, in the past, defendant had authorized turning back odometers on automobiles before selling them, and (4) the allegedly false statements which defendant made before the grand jury were clearly material to its investigation.

Affirmed.

1. Perjury — 12

The essence of the crime of false swearing is the defendant's knowledge at the time of his testimony that it is untrue. 18 U.S.C.A. §1623.

2. Perjury — 12

Where grand jury was investigating what had happened in the past and witness was being interrogated about his present knowledge of those past events, question put to witness in the present tense which asked "Are you aware" of any cars being sold by witness' automobile agency "in 1974 that had odometers turned back" was clear and unambiguous in context and provided a sufficiently precise basis for subsequent charge of false testimony. 18 U.S.C.A. §1623.

3. Perjury — 33(8)

Evidence including testimony of mechanic concerning events from which jury might have concluded that defendant knew that mechanic was turning back automobile odometers and from which jury could conclude that, on at least one occasion, defendant had directed manager of defendant's automobile agency to reduce the mileage registered on an automobile by half was sufficient to support verdict finding defendant guilty of false swearing by reason of his testimony before grand jury wherein he denied awareness that any cars sold by his agency in a certain year had their odometers turned back. 18 U.S.C.A. §1623; Automobile Information Disclosure Act, §§1 et seq., 4, 15 U.S.C.A. §§1231 et seq., 1233.

4. Criminal Law — 673(3)

In prosecution for false swearing before grand jury, former testimony of defendant, the owner of an automobile agency, that his firm routinely turned back odometers prior to passage of federal law which made alteration of odometers a civil offense was properly admitted for purpose of impeachment under instruction that the evidence should be considered only in connection with evidence concerning defendant's reputation for truthfulness and veracity. Federal Rules of Evidence, rule 608(b), 28 U.S.C.A.

5. Perjury — 11(7)

Where offense being investigated by grand jury was removing original price stickers from automobiles and later selling them after substituting different price stickers and where alteration of odometers, even if it was neither a criminal act nor a civil offense at the time, was essential to the success of the suspected offense, statements made by grand jury witness concerning the alteration of odometers were "material" to the grand jury's investigation and provided a basis for subsequent prosecution of the witness for false swearing. 18 U.S.C.A. §1623; Automobile Information Disclosure Act, §4, 15 U.S.C.A. §1233; Motor Vehicle Information and Cost Savings Act, §§1 et seq., 404 as amended 15 U.S.C.A. §§1901 et seq., 1984.

See publication Words and Phrases for other judicial constructions and definitions.

6. Perjury — 36

It is for the court to determine whether statements made by a witness are sufficiently "material" to support a subsequent perjury prosecution.

7. Perjury — 33(6)

Government may meet its burden of proving materiality of previous sworn statements, for purpose of perjury prosecution, by introducing the transcript of the prior proceedings. 18 U.S.C.A. §1623.

Appeal from the United States District Court for the Southern District of Florida.

Before COLEMAN, HILL and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The defendant was convicted on two counts of perjury after a fair trial at which a careful trial judge ruled correctly on the issues sought to be raised as grounds for his acquittal, or, alternatively, dismissal or for a new trial. Our conclusion that the trial court should be affirmed was reached after full study of each of the several issues raised.

I.

Frank Crippen, a businessman living in Miami, Florida, was the owner of an automobile agency, Crippen Oldsmobile. In March, 1975, a grand jury was investigating whether this firm had violated the Dis-

closure of Automobile Information Law, 15 U.S.C. §1233, which makes it a misdemeanor to remove a manufacturer's price sticker from a new car or to alter the original sticker. Crippen testified before the grand jury, as did one Paul LaChance, a mechanic whose skills included the ability to turn back automobile odometers. LaChance had never been an employee of Crippen Oldsmobile but had, from time to time, done work for the company. He denied that this work included turning back odometers.

Crippen testified that turning back odometers once was a common practice in the industry and that his firm had done so routinely in 1972 and before then. But, he said, when a federal law was passed making it a civil offense to turn back odometers, he issued a directive prohibiting it.[1] He was examined about events that occurred thereafter, and he gave answers that later resulted in three counts of the indictment against him.

Later, faced with a charge of false swearing, LaChance recanted. He furnished evidence that resulted in several charges against Crippen and received a promise of immunity. Crippen was indicted on three counts of false swearing in violation of 18 U.S.C. §1623 (Counts I, II and III), two counts of obstruction of justice for allegedly trying to influence LaChance's testimony (Counts IV and V), and one substantive count charging the removal of a manufacturer's price sticker, a misdemeanor under 15 U.S.C. §1233 (Count VI). The false swearing counts were based on the following testimony before the grand jury:

[1]This was the result of the passage of The Motor Vehicle Information and Cost Saving Act, 15 U.S.C. §1984, on October 20, 1972. The statute became effective 90 days later.

Count I: Q. Are you aware of any cars being sold by Crippen Oldsmobile in 1974 that had odometers turned back.

A. No. I am not.

Count II: Q. Mr. Crippen at any time in the year 1974 did you ever order or request anyone to turn back an odometer at Crippen Oldsmobile?

A. No, I did not.

Count III: Q. At any time in 1974 did Paul LaChance while working on the premises of Crippen Oldsmobile here in Miami turn back an odometer.

A. No, not that I know of.

At Crippen's trial, LaChance related that he had turned back about 17 odometers at Crippen Oldsmobile in 1974, and that he received his instructions from the manager, Don Coates, not from Crippen. He testified, however, to events from which the jury might have concluded that Crippen knew what was going on, and, on at least one occasion, directed the manager to reduce the mileage registered on an automobile by half.

There was considerable other testimony against the defendant, and direct, as well as character, testimony on his behalf. He also testified in his own defense.

During the course of the jury's deliberations, it sent the following question to the trial judge:

> Count No. I states, 'Q: Are you aware' [meaning now]. If it were a question, 'Were you aware,' [meaning in 1974] it would make all the difference. Can we have reasonable doubt about the defendant's cognizance of the question or do we accept literally?

The trial judge responded: "I cannot answer this question for you. You will have to decide based upon the indictment, the evidence, and the law as given in the Court's instructions."

The trial judge directed a verdict of not guilty on Count VI at the close of the government's case.

The jury acquitted Crippen on Count II (a false swearing count), and Counts IV and V (obstruction of justice), but found him guilty on two false swearing counts, Counts I and III.

II.

[1] The essence of the crime of false swearing is the defendant's knowledge at the time of his testimony that it is untrue. *United States v. Whimpy*, 5 Cir. 1976, 531 F.2d 768. "[T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner — so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Bronston v. United States*, 409 U.S. 352, 361, 93 S.Ct. 595, 601, 34 L.Ed.2d 568.

[2] The petitioner argues that the question on which Count I was based was not precise enough to be the basis for a charge of false testimony. That the jury asked the question it did makes the argument plausible, even though this issue came belatedly, on appeal, to the defendant's mind, and was never raised in the trial court. *See, United States v. Chapin,* 1975, 169 U.S.App.D.C. 303, 311, 515 F.2d 1274, 1282, where the same post-conviction scrutiny of the record for possible flaws resulted in the same belated and rejected argument.

But, considered in the context of the entire examination of the defendant, the question was clear and unambiguous. The grand jury was investigating what had happened in the past, and Crippen was being interrogated about his present knowledge of those past events. That the petit jury thought of a possible ambiguity, which it evidently later resolved beyond reasonable doubt, is not sufficient to impugn the question.[2] Words clear on their face can be interpreted in various ways when "subjected to ingenious scrutiny after the fact." *United States v. Chapin,* 1975, 169 U.S.App.D.C. 303, 308, 515 F.2d 1274, 1279. The words used were to be understood in their common sense, not as they might be warped by sophistry or twisted in pilpul. The question was clear enough to be answered categorically by the defendant and to serve as a basis for the jury's verdict. *Compare, United States v. Brumley,*

[2]Crippen himself testified. He never suggested that the question was not clear. He confirmed that the answer he gave was truthful. He testified in response to at least one question in the present tense about past events, *e.g.*, "Do you know whether or not that happened?" "No I do not." (Transcript, p. 795)

5 Cir. 1977, 560 F.2d 1268, where we found: "[T]his attempted foundation for a perjury prosecution fails for lack of specificity, for lack of the critical question, and for lack of the unequivocal answer." 560 F.2d at 1277.

[3] The jury was properly instructed on the government's burden of proof beyond reasonable doubt, the essential elements of the offense, and the necessity of proof not only that the answer given was false but also that the defendant made the false declaration knowingly. The trial judge properly added a caution against finding the defendant guilty merely because he gave incorrect testimony because of "surprise, confusion, haste, inadvertence, honest mistake as to facts, carelessness or negligence." Hence, we conclude that the question was clear enough to support the charge, and the evidence was adequate to support the verdict as to Count I.[3]

III.

[4] The defendant called a number of eminent people as character witnesses, While the testimony of each was slightly different, the first, a Roman Catholic Sister who was president of a college on whose board Crippen sat, was typical. She said Crippen's reputation for truth and veracity was good. He was regarded with great trust. He was regarded by "all of us" as "honest and sincere" in his efforts. On cross-examination, the prosecutor asked the witness whether her opinion would be the same had she known that, in the past, the defendant had authorized turning back odometers on automobiles before selling them. The defendant

[3]No similar issue is raised as to Count III.

objected, and the court overruled the objection. This witness said her opinion would be affected by that knowledge.

A similar procedure was followed with each character witness. Some testified that their high opinion of the defendant would not change; others were uncertain.

The court properly charged the jury that turning back odometers was not a criminal offense at the time the defendant admitted that this was done, and the evidence should be considered only in connection with the evidence concerning the defendant's reputation for truthfulness and veracity.

The evidence was obviously relevant to those issues raised by the defendant himself. Even if it was not a criminal offense to alter odometers, and even if automobile dealers had widely engaged in the practice, the only purpose of doing so would have been to deceive the buyer of a car into thinking that it had been operated for less mileage than it had, in fact, been. The jury might believe, as some of the character witnesses did, that honest dealers do not deceive their customers. Or the jury might have believed that this was consistent with high repute because it was so widely engaged in by automobile dealers. The evidence was relevant; its probative value was for the jury.

In a recorded colloquy with counsel, the trial judge made certain that there was a factual basis for the attempted impeachment, as there was in the defendant's own statements to the grand jury in the four pages of the transcript then admitted. He carefully examined Rule 608(b) of the Federal Rules of Evidence, and concluded

the evidence was admissible. He was correct. That Rule states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. . . .

This court has recently affirmed the admissibility of such evidence. In *United States v. Bynum*, 5 Cir. 1978, 566 F.2d 914, p. 919, we said:

> Once a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine his credibility by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct testimony . . . Courts have imposed two important limitations upon judicial discretion in admitting inquiries concerning such prior misconduct; first, a requirement that the prosecution have some good faith factual basis for the incidents inquired about [Citations omitted] and second, a requirement that the incidents

inquired about are relevant to the character traits involved at the trial.

See also, the discussion of the subject in Weinstein and Berger, Weinstein's Evidence, Vol. 3, §608 [06] and §608 [05], pp. 26—8, notes 20, 21, 26 (discussion of what forms of conduct are relevant to truthfulness and veracity). The rule is, of course, consistent with the principle previously applied in *Michelson v. United States,* 1948, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168.

The evidence was not unduly prejudicial, particularly in the light of the court's instruction to the jury. It evidently did not paint the defendant with a tar brush, for the court directed a verdict for him on one count and the jury acquitted him of the charges contained in two of the four courts submitted to them. *Compare, United States v. Abrams,* 5 Cir. 1978, 568 F.2d 411.

[5] The allegedly false statements before the grand jury were clearly material to its investigation. The offense being investigated was removing the original stickers from automobiles and later selling them after substituting different price stickers. If an automobile was to be used as a demonstrator, the original sticker would be removed. If it were later to be sold as new, with a substitute price sticker, any buyer who looked at the odometer would at once perceive that the car was used. Hence, alteration of odometers, even if it was neither a

criminal act nor a civil offense,[4] was essential to the success of the suspected plan.

[6] The issue of materiality is for the court to determine, as it correctly did. *United States v. Gremillion,* 5 Cir. 1972, 464 F.2d 901.[5] *See also, United States v. Abrams, supra; United States v. Damato,* 5 Cir. 1977, 554 F.2d 1371; *United States v. Brumley,* 5 Cir. 1977, 560 F.2d 1268, 1277; *United States v. Whimpy,* 5 Cir. 1976, 531 F.2d 768, 770. *Compare, United States v. Lasater,* 8 Cir. 1976, 535 F.2d 1041.

[7] As we pointed out, in *United States v. Damato,* 5 Cir. 1977, 554 F.2d 1371 (in which we found the testimony not to be material), the government may meet its burden of proving materiality by introducing the transcript of the prior proceedings, as it did here. The trial judge found that the statements were material and then correctly instructed the jury on this issue.

The other contentions of the defendant, that the evidence was insufficient to sustain the conviction, and that the government failed to prove each element of the crime beyond reasonable doubt, are without merit.

For these reasons, the conviction is AFFIRMED.

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[4]Title IV of the Motor Vehicle Information and Cost Saving Act, 15 U.S.C. §§1981-1991, deals with odometers. Section 1984, enacted October 20, 1972, makes turning back odometers a civil offense; Section 1989 creates a private right to sue for damages. Section 1990c, enacted July 14, 1976, makes turning back, or otherwise tampering with, odometers a criminal offense.

[5]That case contains a complete statement of the nature of his offense, the test of materiality, and burden of proof. *See,* 464 F.2d at 905. *See also,* Annotation, 22 A.L.R. Fed. 379.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frank CRIPPEN, Defendant-Appellant.

No. 76-4486.

United States Court of Appeals,
Fifth Circuit.

Aug. 31, 1978.

The United States District Court for the Southern District of Florida, James Lawrence King, J.; convicted defendant of two counts of perjury, and defendant appealed. The Court of Appeals, 570 F.2d 535, affirmed, and defendant filed petition for rehearing. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that although it was essential for Government to allege materiality in indictment for testifying falsely before grand jury and to prove at trial exactly how questions asked were material, indictment for testifying falsely before grand jury was not defective because it failed to include factual basis for allegation of materiality.

Petition for rehearing and petition for rehearing en banc denied.

1. Perjury — 25 (3)

Although it is essential for Government to allege materiality in indictment for testifying falsely before

grand jury and to prove at trial exactly how questions asked were material, indictment for testifying falsely before grand jury is not defective because it fails to include factual basis for allegation of materiality.

2. Indictment and Information — 60, 70.2 (2, 4)

An indictment, to be sufficient, must allege that defendant committed each of the essential elements of the crime charged so as to enable the accused to prepare his defense and to invoke the double jeopardy clause in any subsequent prosecution for the same offense. U.S.C.A. Const. Amend. 5.

3. Indictment and Information — 65

It is not necessary for an indictment to allege in detail factual proof that will be relied upon to support charges, for that information, if essential to the defense, can be obtained by motion for bill of particulars and failure to grant such a motion may be reversible error.

Appeal from the United States District Court for the Southern District of Florida.

Petition for Rehearing and
Petition for Rehearing En Banc

Before COLEMAN, HILL and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

[1] The appellant's petition for rehearing calls to our attention statements made in one of our prior opinions that contradict the results we have reached here. This able presentation enables us to consider more fully the question whether an indictment for making false statements to a grand jury under oath must charge on its face exactly how the question asked the witness were material to the matter under the grand jury's investigation. We conclude that, although it is essential for the government to allege materiality in the indictment and to prove at the trial exactly how the questions asked were material, an indictment for testifying falsely before a grand jury is not defective because it fails to include the factual basis for the allegation of materiality.

To support the argument that an indictment for false swearing must show on its face the factual basis for materiality, including why and how the false statement was material to the grand jury's investigation, appellant relies on observations that literally support this contention made in *United States v. Slawik*, 3 Cir. 1977, 548 F.2d 75, 83, and quoted by this Court in *United States v. Brumley*, 5 Cir. 1977, 560 F.2d 1268, 1275. The statement in *Brumley, supra*, was:

> [T]he conviction could not stand "where the indictment fails to set forth the precise falsehood alleged and the factual basis of its falsity with sufficient clarity to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods."

Our decision in *Brumley* reversed the conviction "[f]or a total failure to establish the indispensable ingredient of materiality." *United States v. Brumley, supra*, 560 F.2d at 1278. Therefore, the observation as to the necessity of alleging materiality was purely obiter dictum. Nonetheless, we have seriously reconsidered the rule thus stated and the argument made in reliance on it.

The indictment in this case set forth the purpose of the grand jury's investigation, "to determine whether violations of the Disclosure of Automobile Information Laws and other statutes of the United States had been committed," as well as the specific questions and answers upon which the perjury charges were founded.[1] In addition, it stated that determining who, if anyone, was removing and altering automobile manufacturer's labels and who was altering odometer readings on automobiles at defendant's dealership were both material to the grand jury's investigation. The alleged deficiency in the indictment stems from its failure to state how turning back odometers was material to the grand jury's investigation.[2]

[2] An indictment, to be sufficient, must allege that the defendant committed each of the essential elements of the crime charged so as to enable the accused to prepare his defense and to invoke the double jeopardy clause in any subsequent prosecution for the same of-

[1]The questions and answers are set out in our earlier opinion. *United States v. Crippen*, 5 Cir. 1978, 570 F.2d 535, 536-37.

[2]How turning back odometers was material to the investigation of the grand jury is answered in our prior opinion. *Id.* at 539.

fense. *United States v. Guthartz*, 5 Cir. 1978, 573 F.2d 225, 227. The indictment of Crippen meets both these tests.

[3] It is not necessary for an indictment to go further and to allege in detail the factual proof that will be relied upon to support the charges. *United States v. Bernstein*, 2 Cir. 1976, 533 F.2d 775, 786, *cert. denied* 1976, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608, *Carbo v. United States*, 9 Cir. 1963, 314 F.2d 718, 732-33, *cert. denied* 1964, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498. *Wilson v. United States*, 5 Cir. 1947, 158 F.2d 659, 663, *cert. denied* 1947, 330 U.S. 850, 67 S.Ct. 1095, 91 L.Ed. 1294. That information, if essential to the defense, can be obtained by a motion for a bill of particulars, *United States v. Johnson*, 5 Cir. July 5, 1978, 575 F.2d 1347, and failure to grant such a motion may be reversible error.

To adopt the rule in false swearing cases that the full predicate for the charge be set forth in the indictment, in addition to the allegations of the essential elements of the offense, would be tantamount to requiring that such supporting evidence be alleged in indictments charging all other federal offenses. This requirement is not warranted by general principles of criminal law, *Estes v. United States*, 5 Cir. 1964, 335 F.2d 609, 619, *cert denied* 1965, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559, nor is it needed to enable the defendant adequately to prepare his defense, nor, finally, does its absence create a danger of double jeopardy. To the extent that *Slawik* requires the indictment to recite facts showing materiality in indictments for false swearing, we decline to adopt it as the law of this circuit.

For these reasons, we consider our original opinion holding the indictment sufficient to be correct and the petition for rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

* * *

"[Prosecutor] MR. WHITTEN: Well, I am only stating that I think the factual — their claim is that on it face, Title 15, 1233, the alteration and removal of manufacturer's suggested price stickers, is not on its face relevant to violations of 1984, turning back odometers, and I fully agree with that conclusion. . . ."

(Supp. R. 22)

* * *

Supreme Court, U. S.
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No. 78-538

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK CRIPPEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 10-13) is unreported. The opinion of the court of appeals (Pet. App. 14-26) is reported at 570 F. 2d 535. The opinion of the court of appeals denying rehearing (Pet. App. 27-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1978. A petition for rehearing was denied on August 31, 1978. The petition for a writ of certiorari was filed on September 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment sufficiently alleged that petitioner's false statements were material to the grand jury's investigation.

2. Whether the government cross-examined petitioner's character witnesses improperly.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623.[1] Petitioner received a sentence of 45 days' imprisonment and two years' probation, and fines totaling $20,000. The court of appeals affirmed (Pet. App. 14-26).

This case arises out of petitioner's testimony before a grand jury investigating violations of the Automobile Information Disclosure Act, 15 U.S.C. 1233, in March 1975 (Pet. App. 17-18; H. Tr. 19). At that time, petitioner denied any knowledge concerning turned-back odometers in cars for sale at his automobile dealership in Dade County, Florida (Tr. 58-59, 792-797; Pet. App. 1-6, 19):

Q. Are you aware of any cars being sold by Crippen Oldsmobile in 1974 that had odometers turned back?

A. No, I am not.

Q. Mr. Crippen, at any time in the year 1974 did you ever order or request anyone to turn back an odometer at Crippen Oldsmobile?

A. No, I did not.

[1]Petitioner was tried on four other counts as well. As to these, the court directed a verdict of not guilty on a count charging removal of a manufacturer's price sticker, in violation of 15 U.S.C. 1233(c). Thereafter, the jury acquitted petitioner on a third perjury count and two further counts charging obstruction of justice, in violation of 18 U.S.C. 1505.

Q. At any time in 1974 did Paul LaChance, while working on the premises of Crippen Oldsmobile here in Miami, turn back an odometer?

A. No, not that I know of.

At trial, LaChance, a mechanic who had done work for the dealership, testified that he had, with petitioner's knowledge, turned back the mileage on approximately 18 to 20 odometers at Crippen Oldsmobile in 1974 as part of a scheme to sell as new demonstrator cars with several thousand miles on them (Tr. 69, 90, 96-100). Indeed, on at least one occasion, petitioner specifically ordered that the mileage appearing on the odometer be reduced by half (Tr. 97-100). LaChance further testified that he had prepared false work orders and lied to the grand jury at petitioner's behest in order to cover up their illegal activities (Tr. 82-95). Other evidence corroborated LaChance's testimony (*e.g.*, Tr. 227-234; Gov't Exhs. 3-6).

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the indictment upon which he was convicted was fatally defective for failure to allege sufficiently the materiality of his perjury. The relevant perjury counts of the indictment (Pet. App. 1-2, 4-5)[2] set forth the statements of petitioner alleged to be perjurious and averred that such statements, made before a grand jury investigating "whether violations of the Disclosure of Automobile Information Laws and other statutes of the United States had been committed," were material "to determine who, if anyone, was removing and altering automobile manufacturer's labels on automobiles at Crippen Oldsmobile" and "to determine who, if anyone, was altering the odometer readings on automobiles at Crippen Oldsmobile * * * so that the

[2]Petitioner was acquitted on one of the three perjury counts (Count II). See note 1, *supra*.

odometers would not accurately reflect the actual mileage of the automobiles" (Pet. App. 1-2, 5). Since this indictment enabled petitioner to prepare a defense to the specific charges while adequately protecting him from future prosecutions for the same offense, both the district court and the court of appeals correctly rejected petitioner's argument on this point (Pet. App. 10-13, 25-26, 29-32). See, *e.g., Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

Nonetheless, petitioner claims that the indictment was deficient because it did not detail how turning back odometers was a material part of the scheme to remove and alter automobile stickers—the crime being investigated by the grand jury.[3] But this Court established long ago that a perjury indictment may generally aver that the perjurious statement was material to a pending specific inquiry and need not "set forth all the details or facts involved in the issue as to the materiality of such statement * * *." *Markham* v. *United States*, 160 U.S. 319, 324-325 (1895); accord, *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Sinclair* v. *United States*, 279 U.S. 263, 296-297 (1929). And here, the indictment sufficiently explained that petitioner's testimony pertained to suspected alterations of both stickers and odometers at petitioner's car dealership. See, *e.g., United States* v. *Crocker*, 568 F. 2d 1049, 1056-1057 (3d Cir. 1977); *United States* v. *Davis*, 548 F. 2d 840, 845 (9th Cir. 1977); *United States* v. *Bernstein*, 533 F. 2d 775, 786 (2d Cir.), cert. denied, 429 U.S. 998 (1976); *United States* v. *Rook*, 424 F. 2d 403, 405 (7th Cir.), cert. denied, 398 U.S. 966 (1970).[4]

[3]At the time of the grand jury investigation and indictment, tampering with an odometer was not, as it is now, a federal crime (Pet. App. 26 n.4). See 15 U.S.C. 1984, 1990c.

Petitioner claims that the court of appeals' decision here is in conflict with the Third Circuit's decision in *United States* v. *Slawik*, 548 F. 2d 75 (3d Cir. 1977). In that case, the court held that "a conviction under 18 U.S.C. 1623 may not stand where the indictment fails to set forth the precise falsehood alleged and the factual basis of its falsity *with sufficient clarity to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods.*" *Id.* at 83 (emphasis supplied). At the outset, we note that insofar as this language mandates more factual specificity in an indictment than is necessary to inform the defendant of the charges against him, including the elements of the crime, and to protect the defendant from future prosecutions for the same crime, the Third Circuit is in conflict with a well-established line of authority in this Court holding to the contrary. See, *e.g., Hamling* v. *United States, supra*; *Markham* v. *United States, supra.* In any event, we believe that careful analysis of the *Slawik* decision and a subsequent Third Circuit opinion strongly suggests that the Third Circuit would reach the same result on the facts of this case.

First, *Slawik* involved a defendant's ambiguous statements whose materiality to the ongoing grand jury investigation was not clearly alleged by the indictment. *Id.* at 79-84. The court, in reversing the defendant's

[4]As the court of appeals noted, if petitioner had desired more information concerning the factual proof establishing materiality in order to prepare his defense, he should have petitioned the trial court for a bill of particulars (Pet. App. 31). Accord, *e.g., United States* v. *Bernstein, supra.*

convictions, found that "so nebulous a legal and factual matrix" precluded "meaningful judicial review of the materiality of those falsehoods." *Id.* at 83-84. In contrast, petitioner made unambiguous statements to the grand jury falsely denying knowledge of an important operation in his ongoing illegal scheme. The materiality of these statements to the grand jury's investigation, which was readily perceived by both lower courts, was clearly identified in the indictment. In short, the cases are distinguishable because the instant indictment does permit "meaningful judicial review of the materiality of those falsehoods." See, *e.g.*, *United States* v. *Crocker*, *supra*.

Moreover, the Third Circuit has subsequently applied the *Slawik* standard, whatever that may be, to an indictment closely analogous to that in question here and upheld the conviction. See *United States* v. *Crocker*, *supra*. The indictment in *Crocker* merely alleged that the defendant, who was a director and disc jockey at a radio station, had testified falsely concerning his receipt of money from record industry figures, without explicating why such statements were material to the grand jury's investigation of criminal wrongdoing in the music industry. Similarly, here the indictment recited petitioner's falsehoods concerning his knowledge of a critical portion of the ongoing scheme which was the subject of the grand jury's investigation. The Fifth Circuit's conclusion below would thus appear consistent with the Third Circuit's analysis in *Crocker*.

2. Petitioner also argues (Pet. 12-14) that the prosecutor cross-examined his character witnesses improperly. Each of petitioner's several character witnesses testified as to petitioner's reputation for truth and veracity, and each was subsequently asked by the prosecutor whether his opinion would be affected by the fact that petitioner had admitted regularly turning back

odometers prior to 1973 (Tr. 672-673, 705-706, 710, 713, 734-740, 762-764).[5] These inquiries, which were based upon petitioner's testimony to the grand jury (Tr. 679-680, 696-698), are expressly authorized by the Federal Rules of Evidence. Fed. R. Evid. 608(b)(2), 405(a); 2 *Weinstein's Evidence* para. 405[02] (1977). Given the relevance of such dishonest and untrustworthy behavior to the witnesses' testimony concerning petitioner's veracity, the district court did not abuse its broad discretion in permitting the prosecution to impeach petitioner's character witnesses by inquiring as to their knowledge of petitioner's admitted odometer tampering. See, *e.g.*, Fed. R. Evid. 608(b), 404(a), 403; *Michelson* v. *United States*, 335 U.S. 469, 478-480 (1948); *United States* v. *Bynum*, 566 F. 2d 914, 919 (5th Cir. 1978). Finally, as the court of appeals noted, petitioner's claim of undue prejudice is belied by the fact that the jury acquitted petitioner on three of the five counts submitted to it (Pet. App. 20, 25).[6]

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[5]The district judge permitted this line of cross-examination only after hearing oral argument outside the presence of the jury as to the relevance, good faith basis and prejudicial effect of the proposed questions (Tr. 676-704, 717-724). Thereafter, he gave a limiting instruction to the jury concerning the purpose for which the cross-examination was permitted (Tr. 1037).

[6]Petitioner's reliance on *Shimon* v. *United States*, 352 F. 2d 449 (D.C. Cir. 1965), and *United States* v. *Curry*, 512 F. 2d 1299 (4th Cir. 1975), is misplaced. Those cases, which were decided before the Federal Rules of Evidence became effective, involved misleading cross-examination of character witnesses concerning alleged other crimes of the defendant which were far more prejudicial to the defendant than probative of his veracity. Here, of course, petitioner's admitted routine of selling cars with false mileage bears heavily on his veracity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of the

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October Term, 1978

NO. 78-538

FRANK CRIPPEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I.

REASONS FOR GRANTING THE PETITION.

Not only does the Solicitor's brief in opposition concede the conflict with *Slawik*, but Petitioner's urging in his petition that the materiality issue will occur over and over until resolved by this Court is coming to pass.

It has now been raised again in the Seventh Circuit and also in this Court. See Petition for Certiorari in *Edelson v. United States*, 581 F.2d 1290 (7 Cir., 1978), *Cert. pending* Case No. _____.

This Court should resolve this important conflict now. The Third, Fifth and Seventh Circuits have all been faced with this issue within the past year and have resolved it differently.

II.

DISCUSSION OF SOLICITOR'S CASES.

A. The Solicitor relies on *Markham vs. United States* 160 U.S. 319 (1895). This old case is merely one of the myriad of cases that can be cited for the proposition that a conclusory allegation of materiality is sufficient where the materiality of the statement is clear on the face of the indictment.

In *Markham* a veteran seeking a pension for a war connected injury testified before the Commissioner of Pensions. The indictment sets forth he lied when asked whether in fact he received the injury after the war or after his discharge. The materiality of that inquiry to the Pension Commissioner's determination of whether the man deserved a pension is obvious on the face of the indictment and *Markham* specifically stated so. *Markham* at 326. The wording of the indictment enabled the Court to engage in "meaningful judicial review of the materiality of the falsehoods." *Slawik* at 83, 84.

The *Crippen* indictment however, does not provide the Court with the tools provided in the *Markham* indictment. The indictment states the grand jury was investigating violations of the Price Sticker Act. 15 U.S. §1233. Contrary to the Solicitor's suggestion no scheme involving demonstrators or relating odometer tampering to price sticker removal was alleged or even suggested in the indictment. A reader of the indictment is unable to make any connection between odometer tampering and price sticker removal. In other words, there simply is no way a reviewing court can determine materiality on the face of this indictment.

Back in the *Markham* era this Court also held in *U.S. v. Cruikshank:*

> [The indictment must] "inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction". 92 U.S. 542, 548 (1876)

The detailed indictment in *Markham* is consistent with *Cruikshank*. The *Crippen* indictment is not. *Cruikshank* is simply the precursor of *Slawik*. *Slawik* is consistent with *Russell v. United States*, 316 U.S. 749 (1962) and *Sinclair v. United States*, 279 U.S. 263 (1929) in requiring, as a basic tenet of due process, that any reviewing court be able to see from reading the indictment alone the materiality of the defendant's testimony.

When the short hand equivalent of "materiality", i.e. "capability of impeding", is substituted for the word "materiality" the issue can be more clearly seen. The indictment, in essence, charged that Crippen's testimony concerning odometer tampering had the capability of

impeding the grand jury's investigation about price stickers. The logic is incomplete however. The conclusion does not follow. There must be a tie-in alleged between odometer tampering and price sticker removal. but no tie-in or scheme is ever alleged. It is impossible for a reviewing court to look at this indictment and determine how or why statements about odometers are capable of impeding a grand jury's investigations concerning price sticker removals. This distinguishes *Markham*.

What the Solicitor and the District Court do however, is infer a scheme and worse, suggest trial testimony proves there was a scheme. Both approaches are impermissible.

The ruse of the entire affair is best realized by the fact no scheme was proved at trial. The Defendant was charged with removing only *one* price sticker and the Judge granted a directed verdict on that count.

B. *Hamling vs. United States*, 418 U.S. 87 (1974), cited by the Solicitor, actually supports the Petitioner. It was not a perjury case, but it did distinguish those cases where tracking the words of the statute is sufficient from those, as here, where more must be done. Relying on *Russell vs. United States*, 316 U.S. 749 (1962) this Court emphasized that:

> Where guilt depends so crucially upon a *specific indentification of fact*, our cases have uniformally held that an indictment must do more than simply repeat the language of the criminal statute. (Emphasis supplied). *Hamling* at 118 quoting from *Russell* at 764:

Thus in the case at bar guilt depended crucially on the specific identification of the factual connection between odometer tampering and price sticker removal. Without that connection any statement about odometer tampering was not material because odometer tampering was not then a crime and investigating odometer tampering was beyond the scope of the grand jury's authority. Accordingly, a statement solely about odometers could not support a perjury conviction.

This indictment did not set forth that specific connection of fact and therefore under both *Russell* and *Hamling* it is insufficient.

C. The Solicitor also urges that the opinion of the Third Circuit in *Crocker vs. United States*, 568 F.2d 1049 (3 Cir. 1977) supports the Government's position. This is not so. *Crocker* relies on *Slawik*. The indictment in *Crocker* states far more than the Solicitor offers. It states the grand jury to be investigating payola pay-offs from record companies to radio station employees and that it was material to determine whether the defendant disc jockey had received any money from a record company. The defendant was charged with perjury for denying he had received pay-offs from certain record company employees to promote a company's record. *Crocker* at 1051, 1052, Like *Markham* the indictment in *Crocker* was sufficient because materiality was apparent on its face.

CONCLUSION

Until *Slawik* or *Crippen* is put to bed the proper materiality contents of a perjury indictment will be a continually relitigated issue. The issue has now arisen in three circuits, and it surely is rising to the top at this very moment in other circuits. Indictments which conceal from judicial review the question of whether the defendant's conduct was actually a crime are violative of due process. Petitioner respectfully submits that this petition for a writ of certiorari has import way beyond this case and should be granted.

Respectfully submitted,

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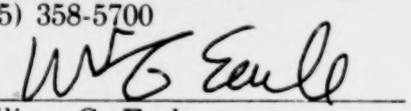
BY: 
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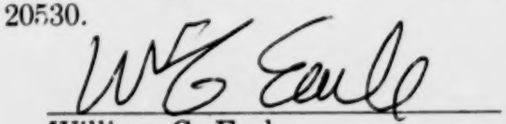
CERTIFICATE OF SERVICE

I certify that a copy of this reply brief was sent to the Office of the Solictor General of the United States of America, United States Department of Justice, Washington, D.C. 20530.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